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In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MARINE SERVICE, INC.,

Petitioner

versus

RYAN WALSH STEVEDORING COMPANY, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented to the Court is whether the doctrine of last clear chance and/or the overt unseaworthiness exception to the seaworthiness rule continue to be applicable in admiralty collision cases after the adoption of comparative negligence by the Court in the case of *United States v. Reliable Transfer,* 421 U.S. 397, 1975 AMC 541 (1975).

LIST OF INTERESTED PARTIES

The undersigned counsel of record for James Marine Service, Inc. certifies that the following listed parties and organizations have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. James Marine Service, Inc.

2. United States Fire Insurance Company.

3. New York Marine Managers, Inc.

4. Ryan Walsh Stevedoring Company, Inc.

5. St. Paul Fire & Marine Insurance Company.

6. Jefferson Disposal Company, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES MARINE SERVICE, INC.,

Petitioner

versus

RYAN WALSH STEVEDORING COMPANY, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James Marine Service, Inc. (James Marine), petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 19, 1984.

I.

OPINION OF THE COURTS BELOW

The opinion of the Fifth Circuit is attached as Appendix A. The Court of Appeals Order denying petitioner's Petition for a Rehearing En Banc was issued without opinion on April 5, 1984.

The District Court's opinion was not reported but is attached hereto as Appendix B.

II.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear the petition under 28 U.S.C. Section 1254(1).

III.

THE QUESTION PRESENTED

The question presented to the Court is whether the doctrine of last clear chance and/or the overt unseaworthiness exception to the seaworthiness rule continue to be applicable in admiralty collision cases after the adoption of comparative negligence by the Court in the case of *United States v. Reliable Transfer*, 421 U.S. 397, 1975 AMC 541 (1975).

IV.

STATEMENT OF THE CASE

This case arises out of an allision between the boom of the crane of the Derrick Barge FRANK L, owned by Ryan Walsh Stevedoring Company, Inc. (Ryan Walsh) in tow of the towboat HIAWATHA and a span of the Huey P. Long Bridge located on the Mississippi River just above New Orleans. The bridge was damaged and the crane knocked overboard. The claim of the bridge owner was settled by petitioner and the matter was tried on the question of liability as between James Marine and Ryan Walsh.

The Lower Court found James Marine solely at fault stating:

> "Under traditional principles of maritime law, once the master of the M/V HIAWATHA took over the D/B FRANK L without knowing the height of the boom or the vertical clearance of the bridge, all responsibility for the safe conduct of the voyage shifted to him..." Appendix B, pp. 8, 9

James Marine appealed arguing that the trial court found that James Marine had the "last clear chance" to avoid the accident but ignored the unseaworthiness and negligence of the derrick barge whose boom was obviously too high to clear the bridge.

The Fifth Circuit's opinion outlined the HIAWATHA's captain's dilemma in ascertaining the height of the FRANK L's boom as follows:

> "The height of a boom may be ascertained through use of a boom angle indicator and a load chart. The only other way to measure the height of a boom is to climb to the top of the boom and measure it with a tape. This method was characterized at trial as 'impractical and unsafe'. Although it was not clearly established whether the barge had a boom angle indicator aboard, the load chart was locked away in the cab of the crane so that the captain could not use it to determine the height of the boom." Appendix A, p. 4.

V.

REASONS FOR GRANTING THE WRIT

Clearly, the owner of a tow has an absolute duty to

furnish a seaworthy vessel. *M/V LENA*, 49 F.Supp. 191 (E.D.N.Y. 1943). Moreover, the owner warrants the seaworthiness of his vessel. *Mechling Barge Lines v. Derby Co.*, 399 F.2d 304 (5 Cir. 1968).

Notwithstanding this and notwithstanding this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975), both lower courts have elected to apply the last clear chance doctrine (and/or the overt unseaworthiness exception to the seaworthiness rule doctrine) in an effort to alleviate Ryan Walsh of its duty to lower the boom on its crane to an acceptable height when it chooses to be towed in New Orleans Harbor such that the boom does not strike overhead objects.

These two doctrines, in the opinion of petitioner, are identical. Judge Learned Hand, in his last case, encountered a similar situation, explained the doctrine and called it "last clear chance". *Chemical Transporter v. M. Turecamo, Inc.*, 290 F.2d 496, 1961 AMC 1520 (2d Cir. 1961). Similarly, Parks, *Law of Tug, Tow and Pilotage*, pages 228, 229, refers to both the duty of an unseaworthy tow as well as the last clear chance doctrine.

Prosser and Keeton on Torts, (5th Ed., 1984) at pp. 462, 463, clearly explains the definition of last clear chance:

> "The most commonly accepted modification of the strict rule of contributory negligence is the doctrine of last clear chance. This doctrine, about which there has been little agreement and endless discussion, had its origin in 1842 in the English case of Davies v. Mann, in which the plaintiff left his ass fettered in the highway, and the defendant drove into it. It was held that the plaintiff might recover, notwithstanding any negligence of his

> own, if the defendant might, by proper care, have avoided injuring the animal.
>
> No very satisfactory reason for the rule ever has been suggested..."

In a last clear chance situation certain conditions must be met before the doctrine is applicable as is explained in *Tilghman v. Chicago & North Western Railway*, 253 Iowa 1339, 1343, 115 N.W.2d 165, 168 (1962).

> "The doctrine of last clear chance presupposes plaintiff's contributory negligence. It applies where there is evidence defendant (1) has actual knowledge of plaintiff's situation, (2) realizes or should in the exercise of reasonable care realize he is in peril, (3) has the ability to avoid injury to plaintiff thereafter and, of course (4), fails to do so."

Prosser and Keeton on Torts, (5th Ed. 1984) at pp. 465, 466 states as follows:

> "There must be proof that the defendant discovered the situation, that he then had the time to take action which would have saved the plaintiff, and that he then failed to exercise reasonable care to avert the accident. In the absence of any one of these elements, the doctrine does not apply and the plaintiff is barred from recovery by his contributory negligence."

The doctrine of last clear chance has never been adopted by this Court but was adopted by the Fifth Circuit in 1927 in *Dameron-White Co. v. Angola Transfer Co.*, 19 F.2d 12, 14 (5 Cir. 1927) and by the Second Circuit in 1931 in *Henry Dubois Sons v. Penn. R.R. Co.*, 47 F.2d 172 (2d Cir. 1931).

The last clear chance rule is not applicable in Great Britian. *The BOY ANDREW,* 1948 AMC 140. Last clear chance has also been abolished in Alaska, California, Wyoming, W. Virginia, Texas, Nevada, Illinois, Colorado, Florida, Maine, Connecticut and Oregon by the adoption of comparative negligence. *Prosser and Keeton on Torts,* (5th Ed., 1984), p. 477.

In its criticism of last clear chance *Prosser* states:

> "This variety of irreconcilable rules, all purporting to be the same, and the lack of any rational fundamental theory to support them, suggest that the 'last clear chance' doctrine is more a matter of dissatisfaction with the defense of contributory negligence than anything else..." *Prosser & Keeton on Torts, supra* at p. 468.

The main reasons for the abolishment of last clear chance are the same reasons for doing away with the divided damages rule or the major-minor fault doctrine, which are well explained in this Court's decision in *United States v. Reliable Transfer, supra.*

Last clear chance has also been criticized by Gilmore and Black. See, Gilmore & Black, *The Law of Admiralty,* (2d Ed., 1975) Sec. 7-5, p. 494, n. 47. The doctrine has also been criticized by various scholars as being inappropriate once a comparative negligence scheme has been adopted. W. Prosser, *The Law of Torts,* (4th Ed., 1971), pp. 427-428, 438-439; Schwartz, *Comparative Negligence,* Sec. 7.2, pp. 133-139; Woods, *Comparative Fault,* (1978), Sec. 8.2, pp. 172-174. Prosser concludes his criticism of last clear chance as follows:

> "...The doctrine thus appears to be a dying one, particularly in many of the jurisdictions which have adopted a system of comparative fault." *Prosser & Keeton on Torts, supra* at p. 468.
>
> * * * *
>
> "The doctrine of last clear chance, which originated as a mechanism for avoiding the harsh effects of contributory negligence, has been abolished in about a dozen jurisdictions since the adoption of comparative fault. Courts in these states have reasoned that the doctrine fails to serve any further purpose and indeed conflicts with the basic principles of comparative negligence." *Prosser & Keeton on Torts, supra* at p. 477.

Consequently, as the "last clear chance" doctrine presupposes the plaintiff's contributory negligence in the first instance, this is as far as the inquiry should proceed. Thereafter, fault should be apportioned in accordance with this Court's decision in *United States v. Reliable Transfer, supra.*

Alternatively, there can be little doubt that the doctrine of last clear chance or overt unseaworthiness requires that the defendant have actual knowledge of the obviously unseaworthy conditions before the doctrine can be applied. Here, such was not the case as James Marine Service was not told of the height of the boom on plaintiff's barge and had no reasonable means of finding it out.

> "The height of a boom may be ascertained through the use of a boom angle indicator and a load chart. The only other way to measure the height of a boom is to climb to the top of the boom and measure it with a tape. This method was characterized at trial as 'impractical and unsafe'.

> Although it was not clearly established whether the barge had a boom angle indicator aboard, the load chart was locked away in the cab of the crane so that the captain could not use it to determine the height of the boom." Appendix A, p. 4.

Accordingly, James Marine Service submits that even if the doctrine of last clear chance is applicable an essential element, knowledge of the unseaworthy condition, is missing.

CONCLUSION

Accordingly, James Marine Service submits that the doctrine of last clear chance and/or overt unseaworthiness was not fashioned in the United States Supreme Court and that this Court's decision in *United States v. Reliable Transfer, supra*, clearly adopts a comparative negligence scheme in admiralty collision cases in which this doctrine has no place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by placing a copy of same in the United States mail, postage prepaid on this _____ day of August, 1984.

JAMES HANEMANN, JR.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3179
Summary Calendar

RYAN WALSH STEVEDORING COMPANY, INC.,

Plaintiff-Appellee,

versus

JAMES MARINE SERVICE, INC.,

Defendant-Appellant.

* * * * *

IN THE MATTER OF THE COMPLAINT OF
JAMES MARINE SERVICE, INC., Owner
of THE M/V HIAWATHA, for exoneration
from or limitation of liability,

Plaintiff-Appellant,

versus

RYAN WALSH STEVEDORING COMPANY, INC.,
ET AL.,

Defendants-Appellees.

* * * * *

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,

Plaintiff,

versus

RYAN WALSH STEVEDORING COMOPANY, INC., ET AL.,

Defendants.

Appeal from the United States District Court
Eastern District of Louisiana

(March 19, 1984)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

This case involves the collision by the boom of a derrick, located on the barge D/B FRANK L with the Huey P. Long Bridge over the Mississippi River at New Orleans, Louisiana, causing damage to the derrick and the bridge. The collision occurred while the barge was in the tow of the M/V HIAWATHA, owned by James Marine Service, Inc. (James Marine). The barge and derrick were owned by Ryan Walsh Stevedoring Company, Inc. (Ryan Walsh). The district court in a bench trial held James Marine, the tug boat operator, solely liable. James Marine appeals, urging no liability or at least partial liability upon D/B FRANK L because it was unseaworthy. This case falls within the admiralty and maritime jurisdiction under Article III, § 2 of the United States Constitution, 28 U.S.C. § 1333, and Fed.R.Civ.P. 9(h). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(3).

Where testimony is in dispute in this record, we defer

to the power of the district judge to make credibility choices in his findings of fact. The Federal Rules of Civil Procedure provide that the district court's "findings of fact shall not be set aside unless clearly erroneous." Fed.R.Civ.P. 52(a); *Williamson v. Brown*, 646 F.2d 196, 200 (5th Cir. 1981). To find that a finding of fact is clearly erroneous we may neither reweigh the evidence nor retry the issues nor substitute our judgment for that of the district court. *Ibid.* In admiralty actions, findings by the district court as to negligence and causation are treated as fact questions reviewable under the clearly erroneous standard. *Transorient Navigators Co., S.A. v. M/S SOUTHWIND*, 714 F.2d 1358, 1364 (5th Cir. 1983).

We summarize the facts as found by the district court. At about 1:30 p.m. on April 2, 1980, a Ryan Walsh barge superintendent, Ray McKee, telephoned tug dispatcher, Gerald McNeil, at Joseph Domino, Inc. McKee requested a tug to move two derrick barges, including the D/B FRANK L, from AMA Anchorage at approximately mile 115 on the Mississippi River to the Celeste Street Wharf in the Port of New Orleans. Soon thereafter, the Domino dispatcher contacted the captain aboard the M/V HIAWATHA, giving him orders to pick up the D/B FRANK L and deliver it to a wharf. Later, Captain Burgo relieved the prior captain who directed Burgo to carry out the assignment.

Arthur Freeney was the last crane operator to work aboard the D/B FRANK L prior to the move. Freeney has since died but his deposition was in evidence. He stated that the derrick was left with the bucket sitting on the deck of the barge and the boom elevated over the head of the barge. There was no "boom cradle" or other device designed to support a lowered boom aboard the D/B FRANK L.

When Arthur Freeney left the barge on the morning of April 2, 1980, he did not know how high the boom was above the water or at what angle the boom rested. The record shows that the design of the crane barge was such that a boom cradle was impractical.

The height of a boom may be ascertained through use of a boom angle indicator and a load chart. The only other way to measure the height of a boom is to climb to the top of the boom and measure it with a tape. This method was characterized at trial as "impractical and unsafe". Although it was not clearly established whether the barge had a boom angle indicator aboard, the load chart was locked away in the cab of the crane so that the captain could not use it to determine the height of the boom.

On previous occasions, including one as recently as about one month prior to the accident, Captain Burgo had moved the D/B FRANK L and its derrick under the Huey P. Long Bridge. On each of these occasions the barge passed under the bridge without incident. However, on April 2, 1980, the Mississippi River had risen to flood stage, between 14.3 and 14.5 feet. Captain Burgo did not check the height of the river, but he said he had checked the height of the bridge on other occasions. He merely relied on past experience and his own judgment to conclude that he could clear the bridge by 15-20 feet.

Captain Burgo made up to the barge and proceeded down river. The boom of the crane projected toward the stern, directly over the wheelhouse of the M/V HIAWATHA. From his position in the wheelhouse, Burgo could not see the top of the boom. As he approached the bridge in the dark, Burgo did not turn lights on the boom or bridge. He made no attempt of a visual sighting. The

boom hit the bridge causing the crane cab and boom to slide off the starboard side into the river. The boom failed to clear the bridge by five to seven feet.

On May 1, 1980, Ryan Walsh filed an in personam action for $3,000,000 against James Marine and its insurers, United States Fire Insurance Company (USFIC) and New York Marine Managers, Inc. (NYMM), and an in rem action against the M/V HIAWATHA. On October 1, 1980, James Marine filed a complaint to exonerate or limit its liability. Ryan Walsh, Southern Pacific Transportation Company (Southern Pacific), and Jefferson Disposal Company all filed answers to the limitation complaint. The district court granted a motion to consolidate the initial suit with the limitation proceeding. On April 2, 1981, Southern Pacific filed an in personam suit against USFIC, NYMM, Ryan Walsh, and Walsh's insurer, St. Paul Fire and Marine Insurance Company, seeking $50,000 in damages for the loss of a railroad section of the Huey P. Long Bridge. The district court granted a motion to consolidate Southern Pacific's suit with the previous two complaints.

On September 2 and 3, 1982, the nonjury trial was held. Ruling only upon the issue of liability, the court held James Marine solely liable for the entire damage to the crane and bridge. James Marine has filed a timely notice of appeal, basically raising two issues: (1) whether its negligence was proved and (2) whether Ryan Walsh, the crane and barge owner, was also negligent and liable.

I.

The district court held that a presumption of fault exists as against a tug that brings her tow into collision with a fixed object. *Bunge Corp. v. M/V FURNESS*

BRIDGE, 558 F.2d 790, 794 (5th Cir. 1977); *Alter Co. v. M/V MISS SUE*, 536 F.Supp. 313, 316 (E.D.La. 1982). James Marine argues that the trial court erred in its application of the presumption. James Marine submits that, instead, the tug's duty was one of reasonable care, citing *Stevens v. THE WHITE CITY*, 285 U.S. 195, 52 S.Ct. 347, 76 L.Ed. 699 (1932), and *Nat G. Harrison Overseas Corp. v. American Tug TITAN*, 516 F.2d 89, 94 (5th Cir. 1975).

Stevens involved a tug's delivery of a damaged tow, where no one could explain the events surrounding the damage. Although the Supreme Court held that no presumption of negligence existed against the tug, that case did not involve a collision between the tow of a tug and a stationary object. *Harrison Overseas Corp.* involved the capsizing of a barge because of improper stowage and unseaworthiness of the barge. Although the court held the tug not liable, that case also did not involve collision.

We have held that when a tug brings its tow into contact with a stationary object, a presumption arises that the collision occurred through the negligence of the tug. In order to exculpate itself, the tug then bears the burden of proving that no act or omission on its part caused the collision, or that the collision was the result of "inevitable accident". *Bunge Corp.*, 558 F.2d at 795. *See also, Alter Co.*, 536 F.Supp. at 316. Thus, the district court properly applied a presumption of fault against the tug because its tow colllided with a stationary object.

The district court found that James Marine was solely negligent. James Marine submits that this finding was clearly erroneous but also that this Court should not be bound by the clearly erroneous rule in this case because there has been an error of law. *See Pullman-Standard v.*

Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Matter of Missionary Baptist Foundation of America v. Huffman*, 712 F.2d 206, 209 (5th Cir. 1983); *Smith v. Hightower*, 693 F.2d 359, 370 n.29 (5th Cir. 1982). James Marine claims that the application of the presumption of fault against the tug prevented the court from examining the unseaworthiness of the barge and the negligence of Ryan Walsh. However, James Marine's allegation that the erroneous application of the presumption tainted the factual findings of the court is without merit. Since the trial court correctly applied the presumption of fault against the tug, the clearly erroneous standard is properly binding on this Court.

When a contract is made to tow a vessel, the owner of the tow warrants the seaworthiness of his vessel, and the owner of the tug is responsible for its safe navigation. *Hart v. Blakemore*, 410 F.2d 218, 221 (5th Cir. 1969). The master of the tug is not under a duty to make a detailed inspection of the barge. *Harrison Overseas Corp.*, 516 F.2d at 94. The duty of the towing vessel is "to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Stevens*, 285 U.S. at 202. The master of a tug towing an unmanned barge must know all conditions essential to the safe accomplishment of the undertaking or voyage. This knowledge includes the depth of the water, the ordinary obstructions, the state of the tides and water levels in the channel, and the clearance of bridges to be negotiated. *Humble Oil & Refining Co. v. Tug CROCHET*, 288 F.Supp. 147, 150 (E.D.La. 1968), *aff'd*, 422 F.2d 602 (5th Cir. 1970). The tug's master must obtain knowledge from personal cognizance, or avail himself of the means of knowledge of conditions which are likely to produce or contribute to a loss unless appropriate means are adopted to prevent it. *See Avera v. Florida Towing Corp.*, 322 F.2d 155, 166 (5th Cir. 1963).

The record clearly substantiates the finding that Captain Burgo failed to exercise reasonable care and maritime skill as a prudent navigator normally would. Burgo had transported the tow previously and had cleared the bridge without incident. This obviously did not lessen his responsibility of care when the river was at flood. The district court properly found that on this particular occasion he failed to exercise reasonable care. As his testimony indicates, he failed to check the river stage at a time the water had reached a high level. He failed to look at the maps on the tugboat on the night of April 2, 1980, to determine the clearance of the Huey P. Long Bridge. Instead, he used his past experience and casual visual observations to conclude that the barge would clear by 15-20 feet. Thus, the finding that James Marine was negligent is not clearly erroneous.

II.

The district court held that once the master of the tug took control of the barge without knowing the height of the boom or the vertical clearance of the bridge, all responsibility for the safe conduct of the voyage shifted to him. James Marine argues that ascribing to it the entire responsibility for the accident is error because Ryan Walsh was also negligent.

James Marine observes that Section 8-3.2.3 of the Safety Code for Floating Cranes and Floating Derricks, American Society of Mechanical Engineers, 1971 (ANSI) requires an operator to lower the boom of a crane before leaving it after completing operations. Section 8-1.3.4 of ANSI requires that a derrick barge have a boom rest or cradle. James Marine argues that Ryan Walsh's violation of both of these provisions amounted to a breach of the

warranty of seaworthiness since the barge was unable "to withstand the ordinary perils to be encountered on the voyage." *South, Inc. v. Moran Towing and Transportation Co.*, 360 F.2d 1002, 1005 (2d Cir. 1966). Hence, James Marine argues, the barge was unseaworthy and its tug was not responsible for the "nonapparent unseaworthiness" of its tow. *Harrison Overseas Corp.*, 516 F.2d at 94.

The district court ruled that the ANSI regulations were not binding upon Ryan Walsh and its failure to adhere to them did not constitute negligence. But the district court did consider them.

> Evidence of custom within a particular industry...is admissible as bearing on the standard of care in determining negligence. Compliance or noncompliance with such custom, though not conclusive on the issue of negligence, is one of the factors the trier of fact may consider in applying the standard of care.

Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1180 (5th Cir. 1975). In its consideration of the regulations as factors the court found that the barge had no boom rest and that the boom had not been lowered. The court concluded, however, that there was not a sufficient showing just from these facts that Ryan Walsh was negligent. Appellant has not shown that this finding is clearly erroneous.

The district court did not make a specific finding on the seaworthiness of the barge. The court stated, however, that even if the barge was unseaworthy, the case would fall within the princple that the tug is responsible when the alleged unseaworthiness is so apparent that it would be

negligent for the tug to attempt to proceed. *Dameron-white Co. v. Angola Transfer Co.*, 19 F.2d 12, 14 (5th Cir. 1927); *Otto Candies, Inc. v. Great American Ins. Co.*, 221 F.Supp. 1014, 1018 (E.D.La. 1963), *aff'd*, 332 F.2d 372 (5th Cir. 1964).

The seaworthiness of the barge could not be determined until the height of the boom and clearance had been calculated. Although the derrick may have lacked a boom angle indicator, no attempt was made by the captain to ascertain the height of the boom or the clearance of the bridge. He merely conjectured that the boom would clear the bridge by 15-20 feet. From the record the captain was negligent for attempting to proceed, because a reasonably prudent tug captain would have known that he had a duty to determine whether the boom would clear. "[C]aptains [are] held to the standard of prudent navigation, including the knowledge they should have had." *Houma Well Service, Inc. v. Tug CAPT. O'BRIEN*, 312 F.Supp. 257, 262 (E.D.La. 1970). He should have obtained the information, or if unable to do so he should not have proceeded with the tow. *See City of New York v. McAllister Bros., Inc.*, 299 F.2d 227 (2d Cir. 1962); *New York Thruway Authority v. Merritt-Chapman*, 1969 A.M.C. 375, 380 (S.D.N.Y.), *Linde-Griffith Const. Co. v. Tug AUTHENTIC*, 1952 A.M.C. 932, 934 (S.D.N.Y.). Since the court properly concluded that in any event the present case falls within the overt unseaworthiness exception to the seaworthiness rule the district court's ruling should not be disturbed.

Finally, James Marine contends that the trial court erred in that it applied the "last clear chance" doctrine. Appellant argues that under *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), which adopted comparative negligence in

maritime collision cases, the "last clear chance" doctrine is no longer viable. The appellant mischaracterizes both the holding of the trial court and the purpose of the doctrine. The trial court never mentioned the doctrine in its opinion. It did no more than apply the exception to the seaworthiness rule that places liability upon the tug when the tow is overtly unseaworthy. Moreover, the *Reliable Transfer* opinion did not reject the last clear chance doctrine. That case clearly does not carry the impact of preventing a court from finding one party solely liable. James Marine has failed to show that the trial court's finding that it was solely liable for this maritime collision. Accordingly, this Court properly affirms the district court's decision.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 80-1582
SECTION "I"

RYAN WALSH STEVEDORING COMPANY, INC.

VERSUS

JAMES MARINE SERVICE, INC., ET AL

CONSOLIDATED WITH

CIVIL ACTION
NO. 80-3760
SECTION "I"

IN THE MATTER OF THE COMPLAINT OF
JAMES MARINE SERVICE, INC., OWNER OF
THE M/V HIAWATHA, FOR EXONERATION
FROM OR LIMITATION OF LIABILITY

CIVIL ACTION
NO. 81-1313
SECTION "I"

SOUTHERN PACIFIC TRANSPORTATION
COMPANY

VERSUS

RYAN WALSH STEVEDORING COMPANY, INC.,
ET AL

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Poydras Street, New Orleans, Louisiana 70112

A. Gordon Grant, Jr., Esq., Montgomery, Barnett, Brown & Read, 806 First NBC Building, New Orleans, Louisiana 70112

MENTZ, District Judge

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This litigation arises out of an accident that occurred when the D/B FRANK L, while in tow of the M/V HIAWATHA, collided with the Huey P. Long Bridge. As a result of the collision, both the bridge and the barge sustained damage. So, too, did the crane located on the D/B FRANK L. Indeed, as a result of the collision, the crane was lifted from its turntable and fell into the river. The owners and underwriters of the M/V HIAWATHA settled the claims of the bridge owners and filed a cross-claim against the D/B FRANK L, her owner and insurer for those damages. Southern Pacific Transportation Company, the owner and operator of a railroad, claims damages for loss of revenue during the time the bridge was being repaired because its trains were delayed in crossing the bridge. Jefferson Disposal Company, Inc., claims damages because during that time its garbage trucks could not use the bridge. This opinion addresses questions of liability only. It does not cover the limitation of liability prayed for by James Marine Service in Civil Action No. 80-3760. A non-jury trial was held on September 2 and 3, 1982.

Ryan Walsh Stevedoring Company, Inc. ("Ryan Walsh"), is an Alabama corporation engaged in stevedoring operations in the Port of New Orleans area and, in

connection therewith, owned and operated the D/B FRANK L at all atimes pertinent to this litigation ("the barge"). James Marine Service, Inc. ("James Marine"), is a Louisiana corporation that owned and operated the M/V HIAWATHA (the "tug") at all times pertinent to this litigation.

On April 2, 1980, the boom of D/B FRANK L struck the highest span of the Huey P. Long Bridge. This bridge, which crosses the Mississippi River at Mile 106, just above the Port of New Orleans, is a fixed structure with roadways for automobile traffic on either side and railroad tracks in its mid-section. Maximum vertical clearance of the bridge is 153 feet at the low-water reference plane and 133 feet based upon 1950 high water.

At the time of the collision, the D/B FRANK L was in tow of the M/V HIAWATHA. Captain Burgo and one deckhand manned the tug; the usual navigational equipment[1] was aboard the tug. The barge was approximately 106 feet in length with an American Hoist revolving crane mounted near is stern. The boom of the crane was set in a partially elevated position in line with the center line of the barge. The crown of the boom plumbed even with the bow of the barge. The barge itself was unmanned. This practice was customary for Ryan Walsh in towing barges from one place to another.

At about 1:30 p.m. on April 2, 1980, the Ryan Walsh barge superintendent telephoned Joe Domino, Inc., ("Domino") a tug broker, and requested that Domino

[1] This included VHF radios, a radar, and a book of navigational charts of the Mississippi River containing a diagram of the Huey P. Long Bridge and its horizontal and vertical clearances.

assign a tug to move the two derrick barges to the Celeste Street Wharf. Domino's dispatcher agreed to make the necessary arrangements for a tug but subsequently called back and said it would be necessary, owing to high river conditions,[2] to move the two barges individually using two tugs. The barge superintendent agreed. At no time, however, did the dispatcher and the barge-superintendent discuss the height of the boom on either barge. There is conflict in the testimony over whether the Ryan Walsh superintendent told Domino's dispatcher that "the barge was ready to go."[3] At trial, the Court asked the dispatcher if that expression had any meaning to him, insofar as navigation was concerned. The dispatcher explained that the expression merely meant "Come get the barge now." On the basis of this testimony the Court finds that the dispatcher did not interpret the expression to mean the crane was in a position to clear the bridge safely.[4]

When the HIAWATHA arrived to pick up the barge, it was unable to make up to the barge because of the placement of various winch wires that helped to secure the barge at its mooring. Captain Burgo communicated this difficulty to the Domino dispatcher, who suggested that Burgo

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[2] Marine surveyor, Jules Schubert, stated that the river stage was fourteen feet and if the river had been seven feet lower, the boom would have cleared.

[3] James Marine argues that this expression assured the tug of the barge's readiness for its intended voyage, *i.e.*, that it was seaworthy. Ryan Walsh counters that McKee simply asked the Domino dispatcher to get a tug to move two derrick barges from Ama to the Port of New Orleans.

[4] It should be noted that Captain Burgo met the tug at the Ama Anchorage and relieved the earlier skipper; there is no suggestion in the testimony that Burgo was told at this time that the tow was "ready to go."

obtain assistance from Ryan Walsh personnel on another crane barge in the area. Captain Burgo then contacted the crew of a nearby Ryan Walsh crane barge. The foreman of that vessel sent over a Ryan Walsh deckhand, who released the winch wires and told Captain Burgo that the FRANK L was "ready to go."

At approximately 7:00 in the evening of April 2, 1980, Captain Burgo turned the FRANK L around in the river and headed south toward the New Orleans harbor. The weather was clear and there was almost no wind. With the barge in front and the boom extending over the wheelhouse, the tug proceeded downriver at approximately 10 knots without a lookout. As he approached the bridge, Captain Burgo failed to shine his spotlight on either the boom or the bridge. Suddenly, Captain Burgo felt a jerk on the vessel. Immediately thereafter, the crane cab and boom slid off the starboard side of the barge into the river.

Experts estimated that the boom of the crane failed to clear the bridge by five to six feet. Burgo admitted he did not know the vertical clearance of the bridge and did not look in his Book of Maps to ascertain it; nor did he know or try to ascertain the river stage to determine clearance. This is especially important since the river was high enough to prompt the tug broker to recommend one tug per barge rather than one tug for both barges, as Ryan Walsh had originally requested.

The Court cannot determine whether the D/B FRANK L had a boom angle indicator on it when the M/V HIAWATHA arrived. This being so, the Court finds that James Marine has failed to satisfy its burden of showing that Ryan Walsh was negligent in failing to furnish the indicator and that such a failure contributed to the collision.

See *Hart v. Blakemore*, 410 F.2d 218 (5th Cir. 1969). The Court does find, however, that the derrick barge had no boom rest (cradle) and therefore did not conform to the Safety Code for Floating Cranes and Floating Derricks, American Society of Mechanical Engineers, 1971 (ANSI) Safety Code, § 81.3.4. This code requires also that the operator, before leaving the barge, lower the boom to the cradle. ANSI Safety Code, § 83.2.3. James Marine has not shown, however, that Ryan Walsh was any way bound by law to comply with these regulations. Consequently, the Court cannot find that Ryan Walsh's failure to do so constitutes negligence.

At issue is whether the tug or the tow was responsible for ascertaining that the boom of the crane on D/B FRANK L could safely pass under the Huey P. Long Bridge. James Marine correctly asserts both that Ryan Walsh, as a party to a contract of towage, warranted that the D/B FRANK L was sufficiently seaworthy "to withstand the ordinary perils to be encountered on the voyage." *South, Inc. v. Moran Towing and Transportation Co., Inc.*, 360 F.2d 1002, 1005 (2d Cir. 1966), and that in determining whether the barge was sufficiently seaworthy to withstand the ordinary perils to be encountered on its voyage, the Court must consider whether the barge was "reasonably fit for its intended purpose." *S. C. Loveland v. East West Towing, Inc.*, 415 F.Supp. 596, 605 (S.D.Fla. 1976), *aff'd*, 608 F.2d 160 (5th Cir. 1979). Additionally, James Marine plausibly argues that, to be reasonably fit for its intended purpose, a floating crane barge must have the ability to function at different sites and the capacity to travel safely from one site to another. Given this, James Marine argues, the FRANK L was not seaworthy and fit for its purpose on April 2, 1980, because its boom height exceeded the vertical clearance of the Huey P. Long Bridge.

James Marine also correctly asserts that a tug is not responsible for accidents which occur as a result of the unseaworthiness of its tow. However, even assuming that the barge was unseaworthy because of the positioning of its boom,[5] James Marine's argument fails, for the Court finds that the instant case falls within an exception to that rule, *i.e.*, the tug is responsible if the alleged unseaworthiness is so apparent that it would be negligent for the tug to attempt to proceed. *Dameron-White Co. v. Angola Transfer Co.*, 19 F.2d 12, 14 (5th Cir. 1927); *Otto Candies, Inc. v. Great American Insurance Co.*, 221 F.Supp. 1014, 1018 (E.D.La. 1963), *aff'd* 332 F.2d 372 (5th Cir. 1964). Even a casual inspection of the D/B FRANK L with its boom in an upright position should have prompted a reasonably prudent tug captain at least to inquire about the height of the boom relative to the bridge clearance. "The duty of the towing vessel is 'to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service.' " *Houma Well Service, Inc. v. Tug CAPT. O'BRIEN*, 312 F.Supp. 257, 260 (E.D.La. 1970), quoting *Stevens v. The WHITE CITY*, 285 U.S. 195, 202 (1932). Based on his earlier trips under the bridge with this derrick barge, Captain Burgo, as a prudent navigator, should have been aware of the obvious danger of a collision, especially in view of the high water stage of the river on April 2, 1980.

James Marine also argues that it was entitled to rely on the barge superintendent's "assurances that the D/B FRANK L 'was ready' for the contemplated voyage. Again, even assuming that the expression "ready to go" was used, the Court finds that this was not meant to certify

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[5] The Court is not determining whether or not this rendered the barge unseaworthy.

that the barge was capable of clearing the bridge; it merely meant that the barge superintendent wanted the tug to move the derrick barge to its next assignment. *City of New York v. McAllister Brothers, Inc.*, 299 F.2d 227 (2d Cir. 1962), wherein a navy tug captain told the towing tug captain that a derrick was "ready to tow", supports this interpretation:

> "We do not consider that either the initial order from the Navy ensign or the response of the Navy tug captain warranted the fitness of the Y.D. 209 to pass under the bridge; we construe both as saying merely that she had no more work to do at Gravesend Bay. *Id.* at 228."

Ryan Walsh argues that the collision was the result of negligent navigation and that the tug alone was responsible for the safe navigation of her unmanned tow. The barge owners contend that a tug which tows her tow into collision, especially with a stationary object, is presumptively at fault. *See, e.g., Bunge Corp. v. M/V FURNESS BRIDGE*, 588 F.2d 790, 794-95 (5th Cir. 1977); *Alter Co. v. M/V MISS SUE and M/V JOHN ROD*, 536 F.Supp. 313, 316 (E.D.La. 1982) ("Dominant Mind" Doctrine)

The master of a tug towing an unmanned barge must know all conditions essential to the safe accomplishment of the undertaking or voyage. This knowledge includes the depth of the water, the ordinary obstructions, the state of the tides and water levels in the channel, and the clearance of bridges to be negotiated. *Linde-Griffith Const. Co. v. Tug AUTHENTIC*, 1952 AMC 932, 935 (S.D.N.Y.), *rev'd on other grounds* 1954 AMC 582 (2d Cir.); *see also, Humble Oil & Refining Co. v. Tug CROCHET*, 288 F.Supp. 147, 150 (E.D. La. 1968), *aff'd* 422 F.2d 602 (5th Cir. 1972). A tug

must make a reasonable inspection of her tow before undertaking a voyage. The tug master, moreover, must obtain knowledge from personal cognizance, or avail himself of the means of knowledge, of conditions likely to produce or contribute to a loss, unless appropriate means are adapted to prevent it. *Tebbs v. Baker-Whiteley Towing Co.*, 271 F.Supp. 529, 538 (D.Md. 1967); *Avera v. Florida Towing Corporation*, 322 F.2d 155, 166 (5th Cir. 1963); *Great Atlantic & Pacific Tea Co. v. Brasileiero*, 159 F.2d 661, 664 (2d Cir. 1947). "[C]aptains [are] held to a standard of prudent navigation, including the knowledge they should have had." *Houma Well Service v. Capt. O'Brien*, 312 F.Supp. 257, 262 (E.D.La. 1970).

The HIAWATHA has not offered sufficient proof to overcome the presumption that a tug which tows her tow into collision, especially with a stationary object, is presumptively at fault. Captain Burgo did not look at the Corps of Engineers Book of Maps aboard the tug to ascertain the vertical clearance of the Huey P. Long Bridge. Nor did he ascertain the level of the water in the river, although that information was readily available from the U.S. Corps of Engineers in New Orleans and was essential to determine the vertical clearance of the bridge. Nor did he attempt to ascertain the height of the boom of the D/B FRANK L. Indeed, Captain Burgo undertook the towage of the D/B FRANK L on the voyage in question on the basis of unsubstantial and erroneous assumptions, using only his past experience as a guide. The fact that he had successfully navigated the same barge under the same bridge on at least two earlier occasions did not relieve him of his responsibility to check the bridge clearance and boom height before embarking on this voyage. " 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable

prudence, whether it is usually complied with or not.' " *City of New York v. McAllister Brothers, Inc., supra* 7, at 228-29 (quoting Mr. Justice Holmes in *Texas & Pacific Ry. Co. v. Behyme,* 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903).

Under traditional principles of maritime law, once the master of the M/V HIAWATHA took over the D/B FRANK L without knowing the height of the boom or the vertical clearance of the bridge, all responsibility for the safe conduct of the voyage shifted to him. He could have made the decision either to get the requisite information or, failing that, not to proceed with the tow. *Houma Well Service v. Capt. O'Brien, supra,* at 262; *The City of New York v. McAllister Brothers, Inc., supra; N. Y. Thruway Authority v. Merritt-Chapman,* 1969 AMC 375, 380 (S.D.N.Y.); *Linde-Griffith Const. Co. v. Tug Authentic,* 1952 AMC 932, 934 (S.D.N.Y.)

In light of the foregoing, the Court holds that James Marine, as owner of the tug, is solely liable for damages, including the loss of the crane, resulting from the collision of the boom of D/B FRANK L with the Huey P. Long Bridge on April 2, 1980.

New Orleans, Louisiana, this 22 day of February, 1983.

/S/ Signed

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-279

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MARINE SERVICE, INC.,
Petitioner

verus

RYAN WALSH STEVEDORING COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE

I.

PETITIONER RAISES A PHANTOM ISSUE

The Lower Courts did not rely on the Doctrine of Last Clear Chance to find Petitioner solely at fault. The District Court in the first instance did not find the derrick barge to be unseaworthy, but only applied the Last Clear Chance Doctrine *arguendo.*

The District Court said:

> "Under traditional principles of maritime law, once the master of the M/V HIAWATHA took over the D/B FRANK L without knowing the height of the boom or the vertical clearance of the bridge, all responsibility for the safe conduct of the

> voyage shifted to him. He could have made the decision either to get the requisite information or, failing that, not to proceed with the tow. *Houma Well Service v. Capt. O'Brien*, 312 F Supp 257 (E.D. La.) at 262; *The City of New York v. McAllister Brothers, Inc.*, 299 F.2d 277 (CA 2 1962); *N.Y. Thruway Authority vs. Merritt-Chapman*, 1969 AMC 375, 380 (S.D.N.Y.); *Linde-Griffith Const. Co. v. Tug Authentic*, 1952 AMC 932, 934 (S.D.N.Y.)."

This is nothing but common sense. A tow does not have to help a tug figure out how to safely navigate. It is exactly what was held in *New York Thruway Authority*, 1969 AMC 375,379,380 (S.D.N.Y.). There the Court said:

> "I agreed with counsel for the Turecamo that at the very least a plausible arguement can be made to the effect that Merritt-Chapman was negligent or careless in not telling Olsen exactly what the height of the boom on the Chelsea was or perhaps even was careless in not anticipating that the height of that boom, whatever it was, was such to cause a problem and possible accident as the tow proceeded under the Tappanzee Bridge.
>
> "However, under traditional principles of maritime law, as I see it, once Rohde took over the tow and learned unequivocally from Olsen that Olsen, who was the man on the scene speaking for Merritt-Chapman, did not know this critical information, then the responsibility shifted to Turecamo, and Turecamo had the last chance and choice. Turecamo and its captain could have made

> the decision either to get the requisite information or, failing that, not to proceed with the tow.
>
> "Under all the circumstances, therfore, I conclude that the proximate cause and the full responsibility for the accident here must fall upon the shoulders of the Turecamo Boys, and a decree, accordingly, should be entered."

Each of these principles of towage law is appropriate to the facts of this case and the application of each or all would saddle the petitioner with sole fault for the collision. See, *The Law of Tug, Tow and Pilotage* (2nd Ed.) (1982) pp. 228, 229. "Tug's Duty to Unseaworthy Tow, Last Clear Chance Doctrine and Intervening Negligence."

In short, Respondent submits that the doctrine of Last Clear Chance is more a matter of causation than it is a matter of comparative fault, and unlike the Major-Minor Fault rule, it was not fashioned to avoid the harshness of the Moieties Rule, but rather as a shorthand method to express principles of causation. Hence, we further submit that the Last Clear Chance Doctrine survives *Reliable Transfer,* 421 U.S. 397 (1975), and that if its application were necessary in this case to support the conclusion of the District Court that the tug was solely to blame for the collision, then it is applicable.

II.

UNIFORMITY AMONGST CIRCUIT COURTS

The Last Clear Chance Doctrine has been adopted by the Fifth Circuit in *Dameron-White Co. v. Angola Transfer*

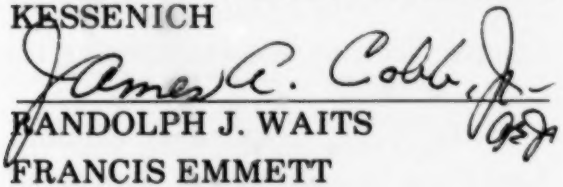
Co., 19 F.2d 12 (5th Cir 1927) and by the Second Circuit in *Henry Dubois Sons v. Penn. R.R. Co.*, 47 F. 2d 172 (2d Cir 1931).

CONCLUSION

The Lower Court did not rely on the Last Clear Chance Doctrine to find the Petitioner solely at fault. The opinions of the Lower Courts are correct. The law applied to the facts are correct and in keeping with well established Towage Law principles and accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EMMETT, COBB, WAITS & KESSENICH



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CERTIFICATE

I hereby certify that a copy of the foregoing has been served on all counsel of record by depositing same in the United States Mail, postage prepaid, properly addressed this 15th day of October, 1984.

James A. Cobb, Jr.

RANDOLPH J. WAITS

JAMES A. COBB, JR.